Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,
Petitioners,

v.

ABC, INC. and HERBERT FISHGOLD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

This case raises the following interrelated issues:

Does a federal court violate the rule of *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) when it confirms the award of a labor arbitrator who decided his own jurisdiction and proceeded with the merits of an arbitration over the repeated objections of a party to a collective bargaining agreement?

May a party's right to an initial judicial determination of substantive arbitrability as required by *AT&T Technologies* be conditioned by the Second Circuit upon that party's filing of a lawsuit to stay the labor arbitration?

Do the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, *et seq.*, prohibit the Second Circuit from requiring a party that seeks an initial judicial determination of substantive arbitrability to first enjoin the labor arbitration in federal district court?

PARTIES TO THE PROCEEDING

The parties in this case are those named in the caption: National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO, CLC; ABC, Inc.; and Herbert Fishgold.

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NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,

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PETITION FOR WRIT OF CERTIORARI

The National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO, CLC ("NABET-CWA" or the "Union") petition for a writ of *certiorari* to review the decision and judgment of the United States Court of Appeals for the Second Circuit in *NABET-CWA v. ABC, Inc., et al.*, Docket Nos. 97-7010, 97-7409 (April 15, 1998).

OPINIONS BELOW

The decision of the court of appeals is reported at 140 F.3d 459 and is reproduced in the appendix to this petition ("Pet. App.") at pp. 1a-8a, *infra*.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 15, 1998. The court of appeals denied a timely petition for rehearing on June 12, 1998. Pet. App. at pp. 9a-10a, *infra*. An application for an extension of time within which to file a petition for a writ of *certiorari* was granted on August 17, 1998. Pet. App. at p. 11a, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101, provides:

> No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Sections 4, 7, 8, 9 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 107, 108, 109 and 113 are set out in Appendix D. Pet. App. at pp. 12a-17a, *infra*.

Section 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may

> be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The collective bargaining agreement between ABC, Inc. ("ABC" or the "Employer") and NABET-CWA, which applies only to sporting events within the continental United States, contains the following no strike clause:

> It is agreed that there will be no stoppage of work, lockout or other interference with Company operations and that the employees hereunder will perform their regular and customary duties for the Company until one of the parties has failed to comply promptly with any final decision of the Impartial Umpire or an arbitrator pursuant to Article XX.

The agreement also contains the following pertinent arbitration clause:

> if a party to the Agreement claims that there will be a violation of Article V [no strike clause] . . . such party shall have the right to file a grievance directly with the Impartial Umpire setting forth such claim, demanding injunctive relief, and invoking the expedited arbitration procedure set forth below.

Between October 25, 1996 and February 16, 1997, NABET-CWA and certain per diem employees engaged in a series of organizing activities directed at organizing all per diem employees of ABC Sports regularly hired to work in Hawaii at live broadcasts such as the Aloha Bowl, the Battle of the Gridiron, the Pro Bowl, and the Hawaiian Open. These employees and these events were indisputably not covered by the parties' collective bargaining agreement. Until this dispute arose, the collective bargaining agreement in its entirety (including the right to grieve or arbitrate on behalf of employees working on these events) simply did not apply.

In an effort to restrain the Union's lawful activities outside the scope of contractual coverage, the Employer invoked an arbitration clause, arranged arbitration dates with the arbitrator, and claimed that the Union was violating the no strike clause.

The Union pointed out that the dispute was not covered by the collective bargaining agreement and that it was not substantively arbitrable. The Union also advised the arbitrator both orally and in writing that the agreement did not cover the dispute, that the parties never agreed to arbitrate non-contractual matters concerning overseas per diem employees, that the arbitrator did not have jurisdiction over the dispute or the authority to decide his own jurisdiction, that the resolution of the parties' disagreement over substantive arbitrability must be decided by a court of law and not by the arbitrator, and that without a court order compelling arbitration, the Union would not participate in an *ultra vires* arbitration.

On December 17, 1996, the arbitrator determined that he had the jurisdiction to decide questions of substantive arbitrability, that the matter was arbitrable, and that he would proceed to hear the merits of ABC's grievance without the Union's participation even though the Union had, by service of a verified complaint upon the Employer and the arbitrator, invoked the jurisdiction of the federal district court seeking to vacate the arbitrator's initial determination of his own jurisdiction over this dispute. Disregarding the Union's protest, the arbitrator conducted a hearing without the Union's participation and determined that NABET-CWA violated the no strike clause and enjoined the Union from engaging in picketing and other activities in Hawaii—activities that would normally be protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157. The arbitrator also retained jurisdiction for the purpose of awarding compensatory and punitive damages against the Union.

Before the federal district court, the Union sought to vacate the awards on the grounds that the arbitrator violated the rule of *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643 (1986) when he decided the issue of substantive arbitrability over the Union's objection and when he decided the merits of the dispute without the contractual authority to do so. The district court (i) upheld the authority of the arbitrator to determine substantive arbitrability, (ii) held that the Union waived its right to a judicial determination of the arbitrator's authority to decide substantive arbitrability because it failed to seek a judicial stay of arbitration, (iii) decided *nunc pro tunc* that the dispute was arbitrable and that the arbitrator had the authority to proceed on the merits, and then (iv) confirmed the awards.

Upon appeal, the Second Circuit could not say with "positive assurance" that the dispute was not arbitrable and rejected the Union's contentions regarding the proper application of the rule of *AT&T Technologies.* Virtually turning the United States Supreme Court's rule of *AT&T Technologies* upside down, the circuit asserted there was no reason why substantive arbitrability, when raised by a party to a labor contract, must be decided by a court in the first instance before an arbitration is held or an award issued. According to the circuit, if the party contesting substantive arbitrability wants a court determination of arbitrability prior to the arbitration taking place, that party has the burden of asking a court to enjoin the arbitration on the ground that the underlying dispute is not arbitrable. In the instant case, the Second Circuit held that an arbitrator can determine his own jurisdiction and proceed with an arbitration over the objections of one of the parties if the party contesting substantive arbitrability fails to seek an immediate stay of the arbitration in district court.

REASONS FOR GRANTING THE WRIT

The Second Circuit decided this case in conflict with applicable decisions of the United States Supreme Court and decisions of other U.S. Courts of Appeals on the same question. Moreover, the circuit's decision raises an important question of federal law which has not been, but should be, settled by the United States Supreme Court.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-558 (1964) and then again in *AT&T Technologies*, the Supreme Court affirmed and reaffirmed that (i) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit, (ii) issues of substantive arbitrability—whether a labor agreement creates a duty for the parties to arbitrate a particular grievance—is undeniably an issue for judicial determination, and (iii) unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered by the parties. . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

AT&T Technologies, 475 U.S. at 649, *citing*, *John Wiley & Sons*, 376 U.S. at 546-547. Reaffirming that arbitrators are not empowered to determine their own jurisdiction, the Supreme Court explained that

> [t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the power to determine his own juris-

> diction . . . Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." . . . This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective bargaining agreements, and is antithetical to the function of a collective bargaining agreement as setting out the rights and duties of the parties.

AT&T Technologies, 475 U.S. at 651.

The Second Circuit, dismissing the rule of *AT&T Technologies*, held that an arbitrator may decide his own jurisdiction over the repeated objections of a party to the collective bargaining agreement if the party contesting substantive arbitrability does not seek to enjoin the arbitration. According to the Second Circuit,

> While the quoted language lends marginal support to NABET's position, we do not believe that it mandates the rule asserted by NABET. We see no reason why arbitrability must be decided by a court before an arbitration award can be made. If the party opposing arbitration desires that order of proceedings, it can ask a court to enjoin arbitration on the ground that the underlying dispute is not arbitrable. If it does not seek to enjoin the arbitration, it can raise the arbitrability issue in a judicial confirmation proceeding. . . . If arbitrability is rejected after the award, the party opposing arbitration will have obtained the relief sought. If arbitrability is upheld after the award, there is no reason for a court not to confirm the arbitrator's award. . . . In such a case, the party opposing arbitration will have obtained the judicial ruling, although adverse, on arbitrability.

NABET v. ABC, 140 F.3d at 462. According to the Second Circuit, "there is thus nothing to be gained by

adopting NABET's proposed rule"—that is, the Supreme Court's rule of *AT&T Technologies*.

Unfortunately, the Second Circuit has premised its interpretation of *AT&T Technologies* upon a legal option that violates the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, and which conflicts with the decisions of other U.S. Courts of Appeals on the same matter.

Unlike the Second Circuit, most circuit courts hold that the Norris-LaGuardia Act bars federal district courts from enjoining labor arbitrations. The Third Circuit, the Ninth Circuit and the D.C. Circuit share the view that an injunction to stay a labor arbitration is barred by Norris-LaGuardia because the underlying grievance constitutes a labor dispute as defined by the Act. The Second Circuit, on the other hand, now requires that a party contesting substantive arbitrability prior to the arbitration taking place ask a court to enjoin the arbitration as a condition precedent to a court determination of substantive arbitrability. In effect, the opinion of the Second Circuit permits an arbitrator to determine his own jurisdiction unless the party contesting substantive arbitrability first seeks to enjoin the arbitration in violation of the anti-injunction provisions of the Norris-LaGuardia Act.

The split and confustion in the circuits over the application of the anti-injunction provisions of the Norris-LaGuardia Act to labor arbitrations has permitted the Second Circuit to turn the rule enunciated by the Supreme Court in *John Wiley & Sons* and *AT&T Technologies* on its head.

That the circuits are split over the application of the Norris-LaGuardia Act to labor arbitrations is clear. While the Second Circuit now requires that a party contesting arbitrability seek to stay the arbitration in order to have an initial judicial determination of arbitrability, other de-

cisions in that circuit, as well as other circuits, suggest that this precondition is unlawful.

For example, the Second Circuit is confused about whether the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, bars a district court from staying a labor arbitration. Both *Longshoremen's Local 1814 v. NYSA*, 965 F.2d 1224 (2d Cir. 1992) and *Jou-Jou Designs, Inc. v. ILGWU*, 643 F.2d 905 (2d Cir. 1981), in contradiction to the opinion in the instant case, hold that Norris-LaGuardia does not permit a district court to enjoin a labor arbitration other than in narrow exceptions such as where a stay is sought to further RICO's remedial purposes. By comparison, *Emery Air Freight Corp. v. Local Union 295*, 786 F.2d 93 (2d Cir. 1986) permits but discourages injunctions in labor arbitrations without mentioning Norris-LaGuardia. That an unresolved split or lack of uniformity presently exists within the circuit is evidenced by a series of cases which freely enjoin labor arbitrations by either ignoring Norris-LaGuardia, *Diamond Glass Corp. v. Local 206*, 682 F.2d 301 (2d Cir. 1982), or by claiming that arbitrations are not labor disputes contemplated by Norris-LaGuardia. *ABC v. AFTRA*, 412 F. Supp. 1077 (S.D.N.Y. 1976); *Umeko, Inc. v. NY Coat Workers*, 484 F. Supp. 210 (S.D.N.Y. 1980); *General Contractors Assn. v. Local 46*, 1990 U.S. Dist. LEXIS 3155 (S.D.N.Y. 1990).

While the Second Circuit has virtually reprimanded Petitioner for failing to seek an injunction in the instant matter, the Third Circuit, interpreting Second Circuit law, has concluded that the federal district courts in the Second Circuit are now barred by Norris-LaGuardia from enjoining labor arbitrations. *Lukens Steel Company v. United Steelworkers of America (AFL-CIO)*, 989 F.2d 668, 677 (3d Cir. 1993). Without doubt, the Third Circuit, the D.C. Circuit, and the Ninth Circuit share the view that an injunction to stay the arbitration of a grievance is a labor dispute governed, and therefore barred, by Norris-

LaGuardia. *Lukens Steel Company*, 989 F.2d at 668; *In re MEBA, Pacific Coast District*, 723 F.2d 70 (D.C. Cir. 1983); *Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1684 (1991).[1]

The First Circuit, on the other hand, has recognized that the law is unsettled and has invited the United States Supreme Court to resolve the conflicts. In *Tejidos De Coamo v. ILGWU*, 22 F.3d 8 (1st Cir. 1994), the court vacated a district court's stay of arbitration on the grounds that it violated Section 7 of the Norris-LaGuardia Act. In so doing, the First Circuit noted the following:

> What law can be found in the circuits may lean slightly in favor of the view that section 7 does apply here: the Ninth Circuit has so held, as did the Third (though by a two-to-one vote); and the Second Circuit cases that look in the opposite direction do not directly discuss our issue.
>
> On balance, we are disposed to hold that section 7 does govern a suit to enjoin a labor arbitration—unless and until the Supreme Court says otherwise. Carving out new exceptions to the Norris-LaGuardia Act, or markedly extending old ones, is primarily a matter for the Supreme Court. We think such a step is entirely possible; but we do not think it so certain that we should anticipate it.

Tejidos De Coamo, 22 F.2d at 13. There is no question that the First Circuit would find the Second Circuit's decision in the instant case violative of Norris-LaGuardia.

The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have not decided this issue although a district court in the Sixth Circuit has reviewed and sum-

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[1] *In Francesco's B. v. Hotel Employees, Local 28*, 659 F.2d 1383 (9th Cir. 1981), the circuit court was not permitted to review an issue similar to the one raised in this case because the initial order of the district court directing the arbitrator to determine his own jurisdiction was not challenged by a timely appeal.

marized the conflicts in the circuits and has concluded that the anti-injunction provisions of Norris-LaGuardia prohibit a district court from enjoining labor arbitrations. *Meijer Inc. v. Food Workers Local 951*, 148 L.R.R.M. (BNA) 2437 (W.D. Mich. 1994), 1994 U.S. Dist. LEXIS 19933.

Notwithstanding that most circuits bar district courts from enjoining labor arbitrations under the Norris-LaGuardia Act, district courts continue to be willing to issue such injunctions. *See, e.g., Post Tribune Publishing v. American Arbitration Association*, 767 F.Supp. 935 (N.D. Ind. 1991); *Standard Drywall, Inc. v. Orange Belt District Council of Painters No. 48*, 111 L.R.R.M. (BNA) 2723 (S.D. Ga. 1982), 1982 U.S. Dist. LEXIS 15853. It is this confusion that has permitted the Second Circuit to fashion a rule of law which conflicts with the rule of *AT&T Technologies.*

This is not the first time that federal courts have failed to heed the United States Supreme Court's warning about permitting an arbitrator to determine his own jurisdiction. The Court did it in *John Wiley & Sons* and then again in *AT&T Technologies.* Petitioner is asking the Court to again protect the integrity of the voluntary labor arbitration process.[2]

It is important for the Court to understand what happened in this case. In most labor arbitrations, parties jointly select an arbitrator after a union's grievance is not resolved at the final step of the grievance procedure. At that juncture, however, an employer rarely agrees to select an arbitrator if it believes the collective bargaining agreement does not cover the dispute in question. In those cases where an employer contests substantive arbitrability, the union is required to compel arbitration in federal district court pursuant to Section 301 of the Labor

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[2] A summary disposition on the merits would also be appropriate in this case.

Management Relations Act, 29 U.S.C. § 185. The district court then applies the "presumptively arbitrable" standard that the Court developed in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), leaving the merits of the case to be decided by the arbitrator.

In the vast majority of cases where the employer contests substantive arbitrability, the union is forced to compel arbitration by filing a federal lawsuit.[3] Rarely is a employer forced to submit to an arbitration before the court has made an initial judicial determination as to arbitrability. It is equally uncommon for an employer to seek a stay of arbitration; the employer effectively stays an arbitration by simply refusing to consent to the selection of an arbitrator. Seldom does an arbitrator walk into a hearing room without both parties having agreed to arbitrate, or without one of the parties having a court order in hand compelling arbitration.

In the instant case, the employer initiated the grievance and the parties had a designated contract arbitrator who did not have to be mutually selected to hear the case. Thus, Petitioner did not have the opportunity to "stay" the arbitration by refusing to select an arbitrator—he was already selected and prepared to proceed in violation of the rule of *AT&T Technologies*. Therefore, ABC had no reason to compel arbitration and Petitioner could not force ABC to get an initial judicial determination of arbitrability as the byproduct of filing a motion to compel. Nor could Petitioner, without violating the Norris-LaGuardia Act, have enjoined the arbitration.

Because the arbitrator unlawfully decided his own jurisdiction and proceeded on the merits without Petitioner's presence, Petitioner never had the opportunity to present

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[3] The Supreme Court has made it clear that questions of procedural, as opposed to substantive, arbitrability are to be decided by the arbitrator. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-558 (1964).

its case on the merits—that a no-strike pledge did not and could not exceed the scope of a collective bargaining agreement and its arbitration clause. While there is no doubt that Petitioner could have participated in the arbitration and preserved its arbitrability objection for a motion to vacate the award, Petitioner would have been compelled to arbitrate a dispute it believed it had not agreed to arbitrate without any prior opportunity for court review. The Second Circuit's decision makes Petitioner's participation on these terms the only option available to a party in this circuit contesting substantive arbitrability. This result does not conform with the law of *AT&T Technologies.*

Petitioner contends that an arbitrator cannot proceed with a hearing without either the consent of the parties or a court order issued pursuant to a motion to compel from the party seeking to go forward with the arbitration.[4] Contrary to the Second Circuit's opinion, this long-held view of *AT&T Technologies* does not create the possibility of two bites at the apple. Rather, a party challenging substantive arbitrability could either choose to participate in the arbitration preserving its arbitrability objection for a motion to vacate, or it could refuse to arbitrate and make its arbitrability objection upon its adversary's motion to compel. If the motion to vacate is denied after the arbitration is held, the arbitration award is confirmed on the merits. If the motion to vacate is granted, the award is null and void. Similarly, if the motion to compel is defeated, the arbitrator cannot proceed for lack of jurisdiction. If the motion to compel is

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[4] The only other time an arbitrator can proceed is when the collective bargaining agreement expressly authorizes the arbitrator to decide substantive arbitrability for the parties. There is no dispute in this case that the collective bargaining agreement between ABC and NABET-CWA does not give the arbitrator that authority. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986).

granted, an arbitration on the merits takes place for the first time. There is never an opportunity for a second bite at the apple. The Second Circuit just got it wrong.

CONCLUSION

This case presents a question of exceptional and recurring importance—whether the Norris-LaGuardia Act prohibits district courts from enjoining labor arbitrations and therefore, prohibits the Second and other circuits from conditioning a party's right to have an initial judicial determination of substantive arbitrability upon a lawsuit to enjoin the arbitration. In this case, the Second Circuit upheld the authority of an arbitrator in a labor dispute to determine substantive arbitrability and his own jurisdiction in violation of *AT&T Technologies*.

Accordingly, Petitioner requests that this Court issue a writ of *certiorari* to review the decision of the Second Circuit in this case.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: November 10, 1997 Decided: April 15,1998)

Docket Nos. 97-7010, 97-7409

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,
Plaintiff-Appellant,

—v.—

AMERICAN BRADCASTING COMPANY, INC. (ABC); HERBERT FISHGOLD,
Defendants-Appellees.

Before:

WINTER, *Chief Judge*,
VAN GRAAFEILAND, and MCLAUGHLIN, *Circuit Judges.*

WINTER, *Chief Judge*:

The National Association of Broadcast Employees & Technicians ("NABET") appeals from Judge Sprizzo's confirmation of three arbitration awards. In the course of reviewing the merits of these awards, the district court

held that NABET's dispute with appellees (collectively, "ABC") was arbitrable under the pertinent collective agreement. NABET argues that the district court incorrectly concluded the arbitrator had power to hear the underlying dispute and that, even if the dispute is arbitrable, NABET is entitled to a second arbitration hearing because no court determined prior to the first arbitration that the dispute was arbitrable. We affirm.

BACKGROUND

For decades, NABET and ABC have been parties to successive collective bargaining agreements governing ABC's employment of NABET members. However, these agreements, including the one pertinent to this appeal, cover the terms and conditions of employment of NABET members only in the continental United States. ABC's employment of NABET members in Hawaii has given rise to the present dispute.

In October 1996, ABC began hiring "freelancers," most of whom were NABET members, for its Christmas Day broadcast of the Aloha Bowl in Hawaii. The hiring of freelancers caused NABET to demand recognition from ABC as the freelancers' collective bargaining representative. ABC refused. NABET then sent a letter to its members, stating that it intended to represent the freelancers and would engage in "lawful activities designed to achieve fair working conditions" for them.

ABC feared that NABET would disrupt ABC's broadcast of the Aloha Bowl. Accordingly, it filed a grievance with the Impartial Umpire provided for in the collective bargaining agreement, claiming that any disruptive activities would violate the agreement. Although all agree that the collective bargaining agreement does not govern ABC's employment of NABET members in Hawaii, ABC maintained that any disruptive activities by NABET were prohibited by Section 5.1 of the agreement even if they

occurred in Hawaii. That Section provides in pertinent part:

> It is agreed that there will be no stoppage of work, lockout, or other interference with Company operations and that the employees hereunder will perform their regular and customary duties for the Company until one of the parties has failed to comply with any final decision of the Impartial Umpire or an arbitrator pursuant to Article XX.

ABC further argued that, because Section 20.10 of the agreement provides that one party may pursue arbitration when it believes the other is about to violate Section 5.1, ABC was entitled to arbitration of the dispute. Section 20.10 provides in pertinent part:

> Notwithstanding any of the foregoing provisions of this Article XX, if a party to the Agreement claims that there will be a violation of Article V, . . . such party shall have the right to file a grievance directly with the Impartial Umpire setting forth such claim, demanding injunctive relief, and invoking the expedited arbitration procedure set forth below. However, this Section 20.10, which is applicable only to actions not yet effectuated, shall be used only if time does not permit the processing of the grievance under the other sections of Article XX . . . . Under the expedited procedure, the arbitration hearings shall commence at the earliest possible availability of the Impartial Umpire, but in no event no more than twenty-four (24) hours after the grievance has been filed . . . .
>
> . . . .
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> . . . The award of the Impartial Umpire shall be rendered at the earliest possible time and in any event no later than twenty four (24) hours after the hearing has been closed . . . . The Impartial Umpire

> shall be empowered under this procedure to order injunctive relief or such other remedy as he or she deems appropriate if the Umpire finds there has been or will be a violation of one of the provisions [of Article V].

NABET disputed both that the underlying dispute was arbitrable and that the activities in Hawaii violated Section 5.1 of the agreement.

On December 17, 1996, the Umpire concluded that he had authority under the agreement to determine the arbitrability of the dispute and that the dispute between ABC and NABET was arbitrable. The next day, the Umpire conducted a hearing on the merits of the grievance. Continuing to challenge the Umpire's determination of arbitrability, NABET did not participate in this hearing. On December 19, the Umpire determined that NABET had violated Section 5.1 of the collective bargaining agreement and ordered it not to interfere with ABC's broadcast of the Aloha Bowl. The Umpire also retained jurisdiction to consider ABC's request for additional injunctive relief regarding the broadcasts of the Pro Bowl scheduled for February 2, the Battle of the Gridiron to be taped on January 30 and broadcast on February 2, and the Hawaiian Open scheduled for February 15-16.

Although NABET did not participate in the Umpire's hearing on the merits of the dispute or ask a court to enjoin the arbitration, it brought the present action seeking, *inter alia*, to vacate the arbitrator's awards on both arbitrability and the merits. The district court independently determined that the dispute between NABET and ABC over the Aloha Bowl, as well as any future similar dispute between the parties, was arbitrable, and confirmed both awards.

A few days later, ABC requested another hearing before the Umpire to seek relief against NABET's planned

disruptive activities at the Pro Bowl and other ABC events in Hawaii. NABET initially stated that it would participate but later accused the Umpire of bias and failed to appear. The Umpire held the hearing in NABET's absence and, on January 22, 1997, issued an award prohibiting NABET from interfering with ABC's February sporting events in Hawaii.

In January 28, ABC sought an order of contempt against NABET and a confirmation of the January 22 Award. The district court confirmed the Award but declined to hold NABET in contempt until a full factual record could be developed. NABET has appealed from the confirmation of the various arbitration awards.

DISCUSSION

NABET advances two primary arguments on appeal, namely, that the dispute was not arbitrable and that, even if it were arbitrable, the awards are nevertheless void because the issue of arbitrability was not determined by a court prior to arbitration.

A. *Arbitrability of the Dispute*

Review of a district court's determination that a dispute is arbitrable is *de novo, see ConnTech Dev. Co. v. University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 683 (2d Cir. 1996), and such questions generally are resolved in favor of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). A grievance is arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). The district court ruled that NABET at least arguably violated Section 5.1 of its collective bargaining agreement with ABC and this viola-

tion entitled ABC to arbitration under Section 20.10 of the agreement. We agree.

Section 5.1 of the collective bargaining agreement prohibits NABET's "interference with [ABC's] Company operations," and Section 20.10 authorizes the parties to arbitrate claims of imminent violations of Section 5.1. NABET contends that because disruption of the broadcast of the designated sporting events was not to take place in the continental United States, such acts could not fall within Section 5.1.

However, Section 5.1 is "susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies*, 475 U.S. at 650. The phrase "Company operations" as used in this Section arguably encompasses all ABC operations, including those outside the continental United States, even though the balance of the agreement governs terms and conditions of employment of NABET members in the continental United States. It strains neither the language of the agreement nor common sense to conclude that in Section 5.1, NABET promised peace to ABC wherever it operated and not just in the continental United States. We cannot say with "positive assurance" that Section 20.10 does not confer jurisdiction on the arbitrator to decide the current dispute, and we must, therefore, presume the dispute's arbitrability. *See id.*

B. *NABET's Entitlement to a Second Arbitration*

NABET also argues that it is entitled to a second arbitration because a judicial determination of arbitrability must, as a matter of law, precede arbitration whenever arbitrability is disputed. According to NABET, this order of proceedings is legally compelled even when the party disputing arbitrability is positioned to, but does not, seek a court order enjoining the arbitration. In NABET's words, the arbitrator's "decision to proceed with the arbitration *prior to* a judicial determination that the [agreement] creates a duty to arbitrate makes any award null

and void." Appellant's Brief at 24. For support, NABET cites language in a number of opinions, including *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964), in which the Supreme Court stated that "compulsory submission to arbitration cannot *precede* judicial determination that the collective bargaining agreement does in fact create such a duty" (emphasis added). *See also AT&T Technologies*, 475 U.S. at 651 ("*If* the court determines that the agreement [requires arbitration], *then* it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement.") (emphasis added); *Stotter Div. of Graduate Plastics Co. v. District 65, UAW*, 991 F.2d 997, 1000 (2d Cir. 1993) (whether dispute is subject to arbitration is "threshold" determination).

While the quoted language lends marginal support to NABET's position, we do not believe that it mandates the rule asserted by NABET. We see no reason why arbitrability must be decided by a court before an arbitration award can be made. If the party opposing arbitration desires that order of proceedings, it can ask a court to enjoin arbitration on the ground that the underlying dispute is not arbitrable. If it does not seek to enjoin the arbitration, it can raise the arbitrability issue in a judicial confirmation proceeding. *See Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1510 (3d Cir. 1994) ("A party does not have to try to enjoin or stay an arbitration proceeding in order to preserve its objection to jurisdiction . . . . A jurisdictional objection, once stated, remains preserved for judicial review absent a clear and unequivocal waiver."), *aff'd*, 514 U.S. 938 (1995). If arbitrability is rejected after the award, the party opposing arbitration will have obtained the relief sought. If arbitrability is upheld after the award, there is no reason for a court not to confirm the arbitrator's award. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941, 946-47 (1995) (confirming arbitrator's award after arbitrator decided he had authority to decide his juris-

diction and found his jurisdiction extended to dispute at hand). In such a case, the party opposing arbitration will have obtained a judicial ruling, although adverse, on arbitrability. There is thus nothing to be gained by adopting NABET's proposed rule.

There is, moreover, much to be lost. Indeed, the proposed rule would frustrate a fundamental goal of arbitration: to provide a simple and expeditious alternative to litigation. *See Mitsubishi Motors*, 473 U.S. at 628. Under NABET's view, arbitration proceedings must come to a halt, and the party seeking arbitration must bear the burden of obtaining a favorable ruling whenever a party disputes arbitrability. If any and all objections to arbitrability were enough to halt the process pending a court order compelling arbitration, a non-grieving party would have an incentive to raise meritless arbitrability issues, particularly where, as here, time is of the essence. Indeed, the rule proposed by NABET is hardly in the interests of unions and their members generally, because they, rather than employers, file the vast majority of grievances under collective agreements. Finally, under NABET's proposed rule, parties would have an incentive to object to arbitrability in order to receive two bites at the apple. A party could object to the arbitrator's jurisdiction, yet wait for the arbitration award to be issued safe in the knowledge that if the award is unfavorable, it can demand a second arbitration.

NABET does not contest the merits of the arbitrator's award. Because the dispute between NABET and ABC was arbitrable and NABET is not entitled to a second chance at arbitration, the awards must be confirmed.

We therefore affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June one thousand nine hundred and ninety-eight

Present: HON. WINTER
Chief Judge

HON. VAN GRAAFEILAND
HON. MCLAUGHLIN
Circuit Judges,

Docket No. 97-7010

NAT'L ASSOC. OF BROAD.,
Appellant

v

ABC, INC.,
Appellee

A petition for rehearing having been filed herein by National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO, CLC. Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

August 17, 1998

Mr. David A. Mintz
Weissman & Mintz
80 Pine Street, 33rd Floor
New York, NY 10005

Re: National Association of Broadcast Employees & Technicians, etc.
v. ABC, Inc., et al.
Application No. A-143

Dear Mr. Mintz:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on August 17, 1998, extended the time to and including November 9, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER,
Clerk

By /s/ Jeffrey D. Atkins
JEFFREY D. ATKINS
Assistant Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Norris-LaGuardia Act

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act.

Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may

be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Section 9 of the Norris-LaGuardia Act, 29 U.S.C. § 109, provides:

> No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, provides:

> When used in this Act, and for the purposes of this Act—
>
> (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations or employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).
>
> (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.
>
> (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employ-

ment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.